Nos. 83-245, 83-291

In the Supreme Court of the United States

OCTOBER TERM, 1983

PENSION BENEFIT GUARANTY CORPORATION,
Appellant,

v.

R. A. GRAY & COMPANY,
Appellee.

OREGON-WASHINGTON CARPENTERS-EMPLOYERS PENSION TRUST FUND,
Appellant,

v.

R. A. GRAY & COMPANY,
Appellee.

ON APPEAL FROM THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

APPELLANT'S BRIEF OF OREGON-WASHINGTON CARPENTERS-EMPLOYERS PENSION TRUST FUND

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QUESTION PRESENTED

In enacting the Multiemployer Pension Plan Amendments Act of 1980, Congress amended certain provisions of the Employee Retirement Income Security Act of 1974. In particular, Congress modified the withdrawal liability of employers who withdraw from multiemployer pension plans. The question presented is whether in giving this modification limited retrospective effect Congress offended the due process clause of the Fifth Amendment.

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This appeal is from the judgment of the Court of Appeals for the Ninth Circuit entered May 20, 1983, declaring that the Multiemployer Pension Plan Amendments Act of 1980 (the "Act") violates the Fifth Amendment due process rights of employers who with-

drew from multiemployer pension fund plans prior to the date the Act was signed into law but after its effective date. R. A. Gray & Company ("Gray") brought an action on September 29, 1981, seeking a declaration of the unconstitutionality of the Act. Gray named the Oregon-Washington Carpenters-Employers Pension Trust Fund (the "Trust Fund") and the Pension Benefit Guaranty Corporation (the "PBGC") as defendants. The District Court found for defendants. Gray appealed and the Ninth Circuit reversed. In contrast to the holding of the Ninth Circuit, the Fourth Circuit more recently has concluded "that the provisions of the 1980 Act for retroactive withdrawal liability are valid and constitutional." *Republic Industries, Inc.* v. *Teamsters Joint Council, No. 83 of Virginia Pension Fund*, 718 F.2d 628, 639 (4th Cir. 1983).

The Trust Fund joins in the opening brief of its co-appellant, the PBGC. As a consequence, the Trust Fund's statement of the case will be abbreviated and its argument supplementary to that provided by the PBGC.

OPINION BELOW

The opinion of the District Court for the District of Oregon is reported at 549 F. Supp. 531 and the opinion and order are reproduced in the PBGC's jurisdictional statement at App. B 30a-49a. The opinion of the Court of Appeals for the Ninth Circuit is reported at 705 F.2d 1502 and is reproduced in the PBGC's jurisdictional statement at App. A 1a-29a.

JURISDICTION

The judgment of the Court of Appeals was entered on May 20, 1983. The Trust Fund filed its notice of appeal on June 16, 1983. The Trust Fund filed its jurisdictional statement on August 19, 1983. On October 17, 1983, this Court noted probable jurisdiction and consolidated for purposes of oral argument the appeal of the Trust Fund, No. 83-291, with the appeal of the PBGC, No. 83-245. The jurisdiction of this Court is based on 28 U.S.C. § 1252.

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fifth Amendment of the Constitution provides, in pertinent part, that "[n]o person shall . . . be deprived of life, liberty, or property, without due process of law . . . ." The relevant statutory provisions are provided in the PBGC's jurisdictional statement at Appendix F 76a-104a.

STATEMENT OF THE CASE

Under the Employee Retirement Income Security Act of 1974 ("ERISA") the PBGC administers a system of insurance designed to protect employees whose pension plans terminate with insufficient funds. As originally enacted, ERISA provided that if an employer withdrew from a multiemployer pension plan, and that plan terminated within five years of the withdrawal, the employer would be liable for its proportionate share of any funds that the PBGC expended to provide re-

quired employee benefits. In 1977, Congress, concerned about the financial stability of multiemployer pension plans, asked the PBGC to prepare a comprehensive report on these plans. The PBGC submitted its report to Congress on July 1, 1978. On February 27, 1979, the agency presented Congress with a legislative proposal addressing the potential financial weakness of multiemployer pension plans. On May 3, 1979, legislation incorporating the PBGC's proposal was introduced in both houses of Congress. The formally introduced legislation adopted the PBGC's proposal to replace the contingent liability of employers with a requirement that an employer's withdrawal be subject to a fixed liability equal to his proportional share of the plan's unfunded vested liability. Both bills introduced on May 3, 1979, specified February 27, 1979, as the effective date for the proposed change in withdrawal liability.

After approval by the House Education and Labor Committee on April 3, 1980, and the House Ways and Means Committee on April 23, 1980, the House passed the Act on May 22, 1980, by a vote of 374-0. The Senate followed suit on July 29, 1980, by a vote of 85-1, after consideration and endorsement by the Senate Labor and Human Resources and Finance committees. President Carter signed the bill into law on September 26, 1980. In its final form, the Act made the new withdrawal provisions effective as of April 29, 1980.

In 1980, Gray was a contributor to a multiemployer pension plan administered by the Trust Fund. Gray

withdrew from the plan effective June 1, 1980. On July 24, 1981, the Trust Fund's trustees formally notified Gray of its withdrawal liability.

Gray filed a declaratory judgment action in the United States District Court for the District of Oregon on September 29, 1981. Gray sought, *inter alia*, a judgment that the retrospective application of the newly imposed withdrawal liability violated Gray's right to due process under the Fifth Amendment. On cross-motions for summary judgment, Judge James A. Redden upheld the constitutionality of the Act and, on August 11, 1982, entered judgment for the Trust Fund and the PBGC, the defendants. On the "Due Process and Retroactivity" issue specifically, the court found that

> "imposition of withdrawal liability was intended to remove existing statutory incentives for employers to withdraw from troubled or potentially troubled plans, while providing that newly entering employers would not be saddled with obligations incurred prior to their entry into the plan. The withdrawal liability also was intended to insure that a withdrawing employer would fund a share of the obligations incurred during that employer's association with the plan." *R. A. Gray & Co.* v. *Oregon Washington, Etc.*, 549 F. Supp. 531, 536 (D. Or. 1982).

The court concluded that Gray had "not shown that the [Act] and its retroactive application are irrational solutions to a serious problem." *Id.* at 538.

Gray appealed to the Ninth Circuit. Gray's appeal was heard at oral argument with appeals in five related cases, and the Court of Appeals reversed the Oregon District Court. The Ninth Circuit balanced a variety of factors, including the equities of all involved, and concluded that "retroactive application of the withdrawal liability provision of the [Act] violates the due process right of employers who withdrew from the multiemployer pension plans before the Act became law." *Shelter Framing Corp.* v. *Pension Ben. Guar. Corp.*, 705 F.2d 1502, 1505 (9th Cir. 1983).

SUMMARY OF ARGUMENT

The Court of Appeals for the Ninth Circuit has held that the Multiemployer Pension Plan Amendments Act, in its retrospective application, violates the due process clause of the Fifth Amendment. The circuit court found two due process failings with the Act. These alleged difficulties are distinguishable, even though they are not clearly distinguished in the lower court's opinion; neither, however, supports the court's conclusion.

First, did Gray receive fair notice that Congress was likely to pass the Act? This Court has not recognized a due-process-of-lawmaking notice requirement. The Court, however, may find that although the public deserves notice of legislative activity, normal legislative processes normally provide constitutionally sufficient notice. In this case, Gray has not shown any divergence from generally acceptable legislative proce-

dures which would support a charge of inadequate legislative notice. Furthermore, the legislative history of the Act lends no credence to such a charge. In addition, although it has been argued below that employers such as Gray justifiably relied on pre-Act law, this argument would rule equally unconstitutional all legislation with retrospective effect, contrary to the teachings of this Court.

Second, is the Act substantively rational? An act of Congress is presumed constitutional until proven otherwise. *Usery* v. *Turner Elkhorn Mining Co.*, 428 U.S. 1 (1976). Gray, the complaining party, must establish that the Act is "arbitrary and irrational." Furthermore, as is clear from *Turner Elkhorn*, inquiry ends if the Court finds that the legislation in issue reflects a rational approach to a problem within Congress' power to address. The Court will not second-guess the wisdom of the legislature's chosen approach, nor will it review the elegance of the legislative craftsmanship nor the fairness of the end result. The Ninth Circuit, however, inappropriately based its constitutional judgment on the wisdom and fairness of the Act. Similarly, Gray's specific charges of substantive inadequacy concern only the wisdom of the Act. The rationality of the approach which Congress chose, and which the Act embodies, remains unimpugned.

ARGUMENT

The question presented here is the power of Congress to determine that the limited retrospective application of proposed regulatory modifications is needed to prevent the imminent passage of the corrective legislation from itself worsening the problem the legislation aims to correct. The Ninth Circuit, by a "balancing of the equities" test, found such legislation unwise and therefore unconstitutional. However, "the burden is on one complaining of a due process violation to establish that the legislature has acted in an arbitrary and irrational way." *Usery* v. *Turner Elkhorn Mining Co.*, 428 U.S. 1, 15 (1976). Gray, the complaining party in the present case, is unable to meet its "heavy burden." 428 U.S. at 44 (Powell, J., concurring).

The question of whether the retrospective application of the withdrawal liability provisions of the Act violates due process comes to the Court with the benefit of two circuit court opinions as well as numerous opinions of district courts. In addition, the PBGC has provided extensive discussion in its opening brief. These facts, together with the requirement that Gray carry the burden of proof in this proceeding, suggest casting the Trust Fund's opening brief in the form of a response to arguments made below. In this way the Trust Fund may supplement, without duplicating, the argument of the PBGC and provide a more intensive analysis of some of the issues presented.

Due process arguments found in the pleadings and opinions below are of two sorts, procedural and substantive. One type of argument suggests that Gray did

not receive fair warning that the Act would contain retrospectively applicable withdrawal liability provisions. Gray has argued, for instance, that it justifiably relied on existing law and thereby was precluded from changing its position in anticipation of the newly-to-be-imposed withdrawal liability. In other words, according to Gray, Congress did not provide Gray with adequate notice of the lawmaking process.

The second type of argument questions substance rather than procedure. Gray's claim, generally stated, is that the presence or absence of certain features in the Act, as applied retrospectively, marks this legislation as arbitrary and irrational.

Section I below discusses the notice issue; section II, that of the rationality of the Act. *Turner Elkhorn*, it is argued, applies in each instance; it disposes of the contention of inadequate legislative procedure as well as the claim of irrational substance.

I. Congress, during the course of its consideration of the Act, provided such notice of the content and retrospective application of the Act as is constitutionally required.

Gray has argued that the Act is unconstitutional because Congress failed to give fair warning of the Act's expected retrospective application. The conclusion of Gray's opening brief to the Ninth Circuit, for instance, reads in its entirety as follows:

> "The virtually unlimited withdrawal liability imposed by [the Act] was an entirely new departure. If Congress has the power to take that step at all in the face of collective bargaining agreements en-

> tered into prior to enactment and relied upon by employers, it must at least be required to give such employers advance warning and an opportunity to adjust to their radically altered potential obligations. This court should hold the law invalid as applied to Gray and should further hold that Gray's motion for summary judgment should have been granted." Appellant's Brief of R. A. Gray & Co. at 20.

In its motion to this Court to affirm the decision of the Ninth Circuit, Gray likewise charges that Congress failed "to provide individual notice to persons contemplating behavior that might later become the basis for liability." Motion to Affirm at 8-9.

In addition, parties combined with Gray for oral argument at the Ninth Circuit contended—and the Ninth Circuit agreed—that employers, Gray included, reasonably relied on the state of the law as it existed prior to the passage of the Act. The reasonableness of such reliance would reflect the sufficiency or insufficiency of legislative notice.

A. This Court has not recognized a legislative notice requirement.

Turner Elkhorn, the Court's most recent case dealing with retroactive legislation, reaffirmed that "legislation readjusting rights and burdens is not unlawful solely because it upsets otherwise settled expectations," and that "[t]his is true even though the effect of the legislation is to impose a new duty or liability based on past acts." *Turner Elkhorn*, 428 U.S. at 16 (citations omitted). No mention is made of any con-

stitutional requirement of notice, let alone individual notice, prior to the passage of legislation with retrospective effect. The test is simply whether the complaining party establishes that the legislation is arbitrary and irrational.

B. Normal legislative processes afford such notice as is constitutionally due.

As an alternative to holding that the due process of lawmaking involves no notice requirement, *Turner Elkhorn* may be read to hold that the legislative process itself, when conducted in a normal and legitimate manner, provides the public with constitutionally sufficient notice of Congress' legislative activities. *Cf. Bi-Metallic Invest. Co.* v. *State Bd. of Equalization*, 239 U.S. 441 (1915).

Turner Elkhorn speaks of the burden on the party who complains of a due process violation "to establish that *the legislature has acted in an arbitrary and irrational way.*" 428 U.S. at 15 (emphasis added). The opinion in *Turner Elkhorn* focuses on whether the product of the legislative process was arbitrary and irrational. However, a claim of deprivation of due process as a result of insufficient notice of congressional lawmaking raises the question of whether the legislative process itself was arbitrary and irrational. On this issue also, the legislation comes to the Court with a presumption of constitutionality. If lack of legislative notice is alleged, the burden remains on the com-

plaining party to establish that Congress did not proceed to its legislative conclusion in a normal, accepted and acceptable manner. The complainant must show that Congress "acted in an arbitrary and irrational way," with a resulting denial of fair notice.

Gray complains of inadequate notice but has not alleged any failure on Congress' part to follow normal legislative procedures. Motion to Affirm at 8-9. Furthermore, the legislative history of the Act shows that Gray could not sustain such an allegation. *See, e.g., Peick* v. *Pension Ben. Guaranty Corp.*, 539 F. Supp. 1025, 1029-33 (N.D. Ill. 1982).

Gray may not have received the "individual notice" which it claims is its right. However, that is of no constitutional moment. Normal legislative procedures afford public notice of congressional activities. Due process requires no more. Any requirement of individual notice of impending legislation to potentially affected individuals would be enormously disruptive of the legislative process.

C. Gray did not justifiably rely on existing law.

Gray has argued, and the Ninth Circuit found, 705 F.2d at 1511, that employers in Gray's position justifiably relied on statutory provisions which regulated employers' withdrawal liabilities from multiemployer pension plans prior to the Act's becoming law. The Ninth Circuit reasoned that, since employers could not "predict with accuracy the final outcome of the legislative process," they reasonably relied

on existing law. *Id.* If this remark about the inability to anticipate the final outcome of the legislative process is taken as a general point about predictive certainty, then the reasoning plainly proves too much. For it would apply with equal force to any legislative product with retrospective effect and hence establish the unconstitutionality of all retrospective legislation. It is accepted, however, that some laws with retrospective effect do pass constitutional muster.

The argument, therefore, must be particularized; the reasoning must be that employers could not predict, i.e., had insufficient notice concerning, the content and effective date of the Act in particular.[1] However, for the reasons which follow, the particularized argument is no sounder than the general one.

First, as emphasized by the District Court in *Peick*, "It has long been a tenet of constitutional law that '[t]hose who do business in the regulated field cannot object if the legislative scheme is buttressed by subsequent amendments to achieve the legitimate end.' F. H. A. v. Darlington, Inc., 358 U.S. 84, 91,

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[1] This apparently is the position of the Ninth Circuit. See especially the following remarks:

> "We reject the argument that the employers should have known the status of the pending legislation and should have known that the Act, when passed, would have a retroactive effect. *See Peick*, 539 F. Supp. at 1053. This much-debated legislation went through a variety of forms before its passage. The bill's original effective date was changed as late as June, 1980. Congress also extended the effective date of the mandatory guarantee program four times while waiting for the [Act] to pass." 705 F.2d at 1511.

> 79 S. Ct. 141, 146, 3 L. Ed. 2d 132 (1958) (citations omitted); accord, Allied Steel, supra, 438 U.S. at 249, 98 S. Ct. at 2724; Veix v. Sixth Ward Building & Loan Assn., 310 U.S. 32, 38, 60 S. Ct. 792, 794, 84 L. Ed. 1061 (1940)." 539 F. Supp. at 1044.

Furthermore, multiemployer pension plans specifically, again in the words of *Peick*,

> "have been subject to decades of pre-[Act] federal regulation under Section 165 (now section 401) of the Internal Revenue Code, section 302 of the Labor-Management Relations Act of 1947, and the Welfare and Pension Plans Disclosure Act of 1958. Moreover, and most significant, the 1974 enactment of ERISA demonstrated in the clearest possible way that contractual limitations on withdrawal liability were themselves susceptible to federal displacement. By its terms, ERISA voided all absolute exemptions, and installed in their place a regime of contingent liability. See p. 1030, supra. This development alone afforded clear warning that the federal government might one day act again and further buttress the legislative scheme it had created." *Id.*

Thus, employers who participated in multiemployer pension plans were on notice that future legislation well might modify existing regulations and thereby alter rights which employers otherwise would have. *See* Note, ERISA's Title IV and the Multiemployer Pension Plan, 1979 Duke L. J. 644, 670-71 (1979).

Second, as the District Court found, the pension plan to which Gray had been a contributor and from which it withdrew "recognized that the employers'

obligations were subject to statutory modification." 549 F. Supp. at 537. Moreover, as the Fourth Circuit acknowledged in assessing employer reliance on specific provisions of ERISA prior to the passage of the Act,

> "since the enactment of ERISA, termination of *single* employer pension funds [had] been fully regulated and regulation of withdrawal from *multiemployer* pension funds was only postponed because of Congressional caution about the best way to approach the problem." 718 F.2d at 638 (emphasis added).

Gray thus had reason to anticipate future modifications of the multiemployer trust fund provisions of ERISA.

Finally, the legislative history of the Act reveals that ample notice was afforded of the intended retrospective application of the Act to withdrawal liability. From the outset, the Act envisaged retrospective application. On May 3, 1979, the date the bill was formally introduced, it carried a date of application of February 27, 1979, the date on which the PBGC had transmitted its proposal to Congress. That proposed date remained a feature of the Act through its consideration by two committees of the House and one of the Senate until, in June, 1980, the Senate Finance Committee advanced the effective date to April 29, 1980, where it remained. Thus, at all times from the date the bill was introduced until its eventual passage, the Act included an effective date of at least April 29, 1980. Furthermore, by April 29, 1980, the Act had

been under consideration for almost two years and had received approval of the House Education and Labor Committee, the House Ways and Means Committee, and the Senate Labor and Human Resources Committee.

The legislative history of the Act, together with the facts that multiemployer pension plans have a significant history of governmental regulation and that eventual changes in the withdrawal liability provisions of ERISA were anticipated, provides ample reason to conclude that sufficient notice was afforded here to satisfy the due process clause of the Constitution. Thus the particularized form of the argument that the final outcome of the legislative process was not predictable shares the failing of the generalized form of argument first considered. If either were accepted, Congress would be precluded from ever providing legislation with limited retrospective application. Gray did not, therefore, justifiably rely upon the regulatory scheme in effect prior to the passage of the Act.

II. Congress acted rationally in giving limited retrospective effect to the multiemployer withdrawal liability provisions of the Act.

Gray argued to the Ninth Circuit that the retrospective application of the withdrawal liability for employers participating in multiemployer pension plans was not a rational response to the problem which Congress sought to address in the Act. The

Court of Appeals agreed. Gray's present position is that "[t]he Court of Appeals correctly concluded . . . that Congress had acted arbitrarily and irrationally in including [the] provision [for retroactive liability] in the Act." Motion to Affirm at 6. Before attempting to assess the particular considerations adduced in support of the position of Gray and the Ninth Circuit, it is appropriate to inquire as to the test which should be brought to bear on a question of whether a legislative act is substantively adequate under the due process clause of the Fifth Amendment. Such an initial inquiry is particularly appropriate in this case where, as will be argued below, the Court of Appeals has applied an incorrect test in assessing the constitutionality of an act of Congress.

A. The analysis of Turner Elkhorn requires only that the legislative approach be rational, not that its implementation be wise.

Turner Elkhorn makes it quite clear, and it has not been disputed in this case, "that the burden is on one complaining of a due process violation to establish that the legislature has acted in an arbitrary and irrational way." 428 U.S. at 15. Furthermore, this Court has been equally explicit that it does not "sit as a 'superlegislature to weigh the wisdom of legislation' . . . ." *Ferguson* v. *Skrupa*, 372 U.S. 726, 731 (1963) (quoting *Day-Brite Lighting, Inc.* v. *Missouri*, 342 U.S. 421, 423 (1952)). *See also Turner Elkhorn* 428 U.S. at 18-19. What remains implicit in the *Turner Elkhorn* opinion is how the Court reviews the

retrospective application of congressional legislation for substantive validity so as to determine whether the complainant has shown that the legislation is "arbitrary and irrational" while at the same time eschewing assessment of "the wisdom of Congress' chosen scheme." *Turner Elkhorn*, 428 U.S. 18-19. For assistance in articulating the Court's approach we look to the body of the *Turner Elkhorn* opinion.

In *Turner Elkhorn* the Court reviewed the Black Lung Benefits Act of 1972 by which Congress sought to provide for compensation to "certain miners, former miners, and their survivors for death or total disability due to pneumoconiosis arising out of employment in coal mines . . . ." 428 U.S. at 5. Certain coal mine operators contested the constitutionality of the Act insofar as it operated retrospectively "to impose liability upon them for former employees' disabilities . . . ." *Id.* at 15. In addressing this issue, the Court first posted reminders that the complaining party has the burden to prove that the Act was arbitrary and irrational, that "legislation readjusting rights and burdens is not unlawful solely because it upsets otherwise settled expectations," 428 U.S. at 16 (citations omitted), and that "[t]his is true even though the effect of the legislation is to impose a new duty or liability based on past acts." *Id.* (citations omitted). The Court then proceeded to observe that since "[i]t does not follow . . . that what Congress can legislate prospectively it can legislate retrospectively[,] [t]he retrospective aspects of legislation, as well as the prospective aspects, must meet the test of due pro-

cess . . . ." *Id.* at 16-17. Moreover, "the justifications for the latter may not suffice for the former." *Id.* at 17.

In response to the specific charge that the retrospective aspects of the Black Lung Act were unconstitutional, the Court first determined whether, in adopting these features, Congress had made a rational choice. It held that "it is for Congress to choose between imposing the burden of inactive miners' disabilities on all operators . . . or to impose that liability solely on those early operators whose profits may have been increased at the expense of their employees' health." *Id.* at 18. Congress in fact made the latter choice and the Court found that it was a rational cost-spreading approach. *Id.* [2]

The Court next took up the contention that the Black Lung Act inequitably allocated the burdens of providing the compensation the Act mandates. It is unfair, it was argued, to make early mine operators shoulder the major portion of the burden while newcomers to the industry may escape liability altogether. The Court's response to this line of reasoning was to dismiss it without any examination of its merit. Congress legitimately decided to provide compensation to victims of black lung disease and made a rational choice

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[2] In the course of its inquiry into whether the Black Lung Act was rational in its approach, the Court remarked that it was hesitant "to approve the retrospective imposition of liability on any theory of deterrence or blameworthiness" on the facts of the case before it. 428 U.S. at 17-18 (citations omitted). The Court in no way suggested that deterrence could never offer a basis for providing legislation with retrospective effect.

concerning how to spread the costs of that compensation. Whether or not the Black Lung Act operated fairly or unfairly in its retrospective effect was not a matter of proper judicial inquiry. In the Court's words,

> "We are unwilling to assess the wisdom of Congress' chosen scheme by examining the degree to which the 'cost-savings' enjoyed by operators in the pre-enactment period produced 'excess' profits, or the degree to which the retrospective liability imposed on the early operators can now be passed on to the consumer. It is enough to say that the Act approaches the problem of cost spreading rationally; whether a broader cost-spreading scheme would have been wiser or more practical under the circumstances is not a question of constitutional dimension." *Id.* at 18-19 (citations omitted).

B. The Ninth Circuit, in applying the Nachman test, unavoidably assessed the wisdom and fairness of the Act.

In determining whether the Act in its retrospective application complies with the requirements of due process, the Ninth Circuit applied a test derived from *Nachman Corp.* v. *Pension Ben. Guaranty Corp.*, 592 F.2d 947 (7th Cir. 1979), *aff'd on statutory grounds*, 446 U.S. 359, *reh'g denied*, 448 U.S. 908 (1980). While acknowledging that the Act "comes to the courts with a presumption of constitutionality and that the burden is on the plaintiffs to establish that Congress acted in an arbitrary and irrational way," 705 F.2d at 1510, the court undertook to assess the rationality

of the retrospective features of the Act in terms of the following four factors:

> "(1) the reliance interests of the parties affected; (2) whether impairment of the private interest is effected in an area previously subjected to regulatory control; (3) the equities of imposing the legislative burdens; and (4) the inclusion of statutory provisions designed to limit and moderate the impact of the burdens." *Id.* at 1511.

These four categories are not separate and independent. The second, "prior regulation," is, as the court admits, "another facet of reliance." *Id.* at 1512. Prior regulation goes to the reliance interests of the withdrawn employers,[3] though not, or only indirectly, to the other reliance interests canvassed by the first factor. Similarly, factor four, "moderating provisions," is simply one aspect of the court's discussion of number three, "equities." With the latter category, the court itself states that it confronts "the difficult task of weighing the individual burdens on withdrawing employers against the policies Congress hoped to further by establishing a retroactive effect date for the [Act]." *Id.* at 1512. By moderating provisions the court simply has in mind those provisions of the Act that may lessen in some way "the individual burdens on withdrawing employers."

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[3] This has been elaborated upon in the earlier discussion of whether employers were put on notice, sufficient for constitutional purposes, of possible modifications in existing withdrawal liability provisions of ERISA.

Collapsing the "four factors" into those of reasonable reliance and equity helps to show that, although the ostensible purpose of the Ninth Circuit's examination was to assess the rationality of the Act, in point of fact the court engaged in a fundamentally equitable inquiry. On the one hand, it inquired whether employers reasonably relied on preexisting law. On the other, it employed the chancellor's scales to weigh whether it was fair for employers to shoulder their withdrawal liability, given the purpose that Congress sought to achieve. The approach taken by the Ninth Circuit thereby is revealed to be at odds with that set out and followed in *Turner Elkhorn*. The Court of Appeals, with its preeminently equitable perspective, unavoidably passed on the wisdom of the Act, rather than its rationality, in assessing the constitutionality of the legislation.[4]

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[4] Although the Trust Fund believes that the *Nachman* test, as applied by the Ninth Circuit, misconstrues the nature of due process inquiry into the substantive adequacy of a legislative act, we would maintain that the Ninth Circuit was wrong on its own terms and that, assuming, *arguendo*, the appropriateness of the *Nachman* test, Gray still fails to meet its burden of proving a due process violation. In this regard, in addition to the recent opinion of the Fourth Circuit, we would again direct the Court's attention to the thoughtful opinion of Judge Susan Getzendanner. *Peick*, 539 F. Supp. 1025.

The *Peick* court, applying the *Nachman* analysis, found that the retrospective features of the Act caused no violation of due process, although the court considered the question a "close call." *Id.* at 1056. In the latter regard, however, we would note the court's candid remark that it was assum[ing] that contract clause principles are relevant in this suit. If they are

(Footnote continued)

C. Specific objections to the content of the Act go to the wisdom, and not the rationality, of the Act

The specific objections offered by Gray and taken up by the Ninth Circuit to the content of the Act simply amount to the complaint that Congress did not legislate well enough. Congress did not target the withdrawal liability provisions as tightly as it might

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not, the case for Congress is much clearer." *Id.* n.80 (citations omitted).

Peick's remark about contract clause principles raises two questions. Do contract clause principles properly apply in this case? If so, does the *Nachman* analysis articulate those principles? On the first of these questions, we believe that this Court's recent cases have distinguished between the levels of scrutiny called for by the contract and due process clauses and have made it clear that the contract clause imposes a stiffer requirement on a state than the due process clause requires of Congress. *Compare Allied Structural Steel Co.* v. *Spannaus*, 438 U.S. 234, *reh'g denied*, 439 U.S. 886 (1978), *and United States Trust Co.* v. *New Jersey*, 432 U.S. 1 (1977), *with Turner Elkhorn*, 428 U.S. 1 (1976). The due process test of *Turner Elkhorn*, and not contract clause principles, applies in this case.

On the second question, we take no position as to whether the *Nachman* test would be appropriate in a contract clause setting. Still on *Nachman*, however, although this Court granted review and affirmed the Seventh Circuit's judgment on statutory grounds, several courts have concluded that the Court endorsed *sub silentio* the constitutional aspect of *Nachman* as well. *See, e.g., Republic Industries*, 718 F.2d at 636 n. 9. Be that as it may, we find no reason to believe that the Court approved the particular analysis used by *Nachman* in reaching a constitutional conclusion. Thus, this Court has not sanctioned the *Nachman* test for due process analysis; nor should it.

have, consistent with its announced purposes. As a result, it is alleged, the Act has unfairly caused hardship. The following passages are quite typical, if not quite exhaustive, of this type of complaint.

> "The employers subjected to retroactive withdrawal liability under [the Act] . . . are required to contribute to the plan's trust fund, without any showing of need, simply to provide a nonspecific supplement to the fund's other income." Motion to Affirm at 15.

> "Congress made no attempt to limit the retroactive application of [the Act's] withdrawal liability to situations in which there was any danger that the employee-beneficiaries' legitimate expectations of the plan might not be met." Motion to Affirm at 15.

> "The withdrawal liability imposed on the employers for their pre-[Act] termination may well be disproportionate to the specific needs of the pension trust funds. Other legislative programs would have served the same purpose of ensuring financially healthy multiemployer plans." 705 F.2d at 1514.

The fundamental response to such objections as these is that "[u]nder the system of government created by our Constitution, it is up to legislatures, not courts, to decide on the wisdom and utility of legislation." *Ferguson* v. *Skrupa*, 372 U.S. at 729. Whether Congress could have more equitably tailored the implementation of its chosen approach to strengthening multiemployer pension plans "is not a question of consti-

tutional dimension." [5] *Turner Elkhorn*, 428 U.S. at 19.

It has been contended that "[t]he effective date of the Act was arbitrarily fixed." 705 at 1513.[6] Even if that were true, however, it would not in the slightest suggest that it was arbitrary and irrational to incorporate into the Act a provision of limited retroactivity.[7]

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[5] A separate question, but one which this Court need not reach, is whether the Act represents such a poor job of legislative craftsmanship as Gray alleges and the Ninth Circuit found. Other lower courts have discussed the perceived harshness to certain employers in the light of the Act's mitigating provisions and have concluded otherwise. *See, e.g., Republic Industries*, 718 F.2d 628, and *Peick*, 539 F. Supp. at 1025.

In addition, and despite the Ninth Circuit's voiced assurance that the above-quoted remarks are only addressed to the retrospective features of the Act, 705 F.2d at 1514, it would appear that the type of objection here considered would apply equally to the prospective application of the modifications of employer withdrawal liability. However, the constitutionality of the prospective features of the Act is not at issue.

[6] Motion to Affirm at 23 ("No explanation for the April 29 date was offered.").

[7] Within some range of possible dates of application of the Act there may have been no better reason to select any one than any other. In just that sense, then, it would be "irrational" to select any specific date for the effective date of the Act. And yet, it is not "irrational" to make the Act retroactive; i.e., it is not "irrational" to select *some* date as the effective date of the Act.

This is a form of the familiar lottery paradox. In a fair lottery with a large number of tickets, the odds are against any particular ticket being the winning ticket. It is then "irrational" to expect any particular ticket to be the winner. And yet, it is perfectly "rational" to expect *some* ticket to be the winner.

Congress enacted the Act to protect the financial soundness of multiemployer pension plans. The legislature was concerned that existing law encouraged employer withdrawals. Responsive to its concern, Congress chose to impose a noncontingent withdrawal liability upon employers who withdraw from a plan. Then, so that the passage of the Act itself would not exacerbate the problem the Act was designed to correct, Congress gave limited retrospective effect to the new withdrawal provisions. The legitimacy of Congress' purpose and the rationality of its chosen approach can scarcely be in doubt. Furthermore, consistent with *Turner Elkhorn* and the cases it draws upon—consistent indeed with the separation of the legislative and judicial powers under our constitutionally created system of government—the wisdom or fairness of the specific measures adopted to implement the chosen approach are not "of constitutional dimension."

In sum, the Act's content is not irrational and thus does not offend the due process clause of the Fifth Amendment.

CONCLUSION

Gray contends that Congress "acted in an arbitrary and irrational way" both procedurally, in failing to provide constitutionally adequate notice of the retrospective effect of the Act, and substantively, in making the withdrawal liability provision retroactive at all. First, however, the normal legislative process whereby

a bill becomes law normally provides such notice as is constitutionally required and it did so in this instance. Second, Congress pursued a rational approach to the need it perceived of strengthening multiemployer pension plans; and the legislative details employed in implementing Congress' chosen approach are not a proper subject of due process scrutiny. In both its process and its product Congress is not to be faulted on due process grounds.

Therefore, the judgment of the Ninth Circuit that the Act is unconstitutional in its retrospective application should be reversed.

Respectfully submitted,

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